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IN THE SUPREME COURT OF THE UNITED STATES

PETE GEREN, SECRETARY OF THE ARMY, ET AL.,
PETITIONERS
v.
SANDRA K. OMAR AND AHMED S. OMAR, AS NEXT FRIENDS OF SHAWQI AHMAD OMAR.

MOHAMMAD MUNAF, ET AL.
v.
PETE GEREN, SECRETARY OF THE ARMY, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF *AMICI CURIAE* M. CHERIF BASSIOUNI AND OTHER INTERNATIONAL LAW PROFESSORS LISTED HEREIN IN SUPPORT OF OMAR et al. AND MUNAF et al.

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TABLE OF CONTENTS

Table of Authorities iii

Statement 1

Interest Of *Amici* 2

Summary of Argument 3

Argument 4

A. Extradition is the Exclusive Process By Which the United States May Transfer U.S. Citizens in its Custody and Control (Whether or Not In U.S. Territory) To a Foreign State 4

1. The Due Process Clause Protects U.S. Citizens, Here and Abroad, Against Lawless Or Arbitrary Transfers By The U.S. To A Foreign State 5

2. Any Proposed Transfer Of A U.S. Civilian Citizen To The State of Iraq Can Only Be Done If Authorized By, And In Accordance With, The U.S.-Iraq Extradition Treaty, Which Explicitly Applies to Territory "In The Occupancy And Under The Control Of" The U.S. 10

3. The U.S. Extradition Statute Is Not Limited To Persons Within The Territorial United States. 14

4. There Is No Status of Forces Agreement With Iraq, And No Status of Forces Agreement Could Authorize Transfer Of

A U.S. Civilian Citizen Not Part of the Military 23

B. Extradition Procedures Fully Protect the Interests of the United States, the Foreign State That Seeks Extradition, and the U.S. Citizens Whose Extradition Is Sought. 29

1. The Request for Extradition 34

2. The "Probable Cause" Hearing 34

3. Habeas Corpus in Extradition Proceedings 35

4. The Discretion of the Department of State Not to Extradite 35

Conclusion 37

Appendix A — List of *Amici* ..... a

TABLE OF AUTHORITIES

Page(s)

CASES

Addington v. Texas,
441 U.S. 418 (1979) 5

Bisson v. The United Nations,
06-civ-6352, 2007 WL 2154181
(S.D.N.Y. July 27, 2007) 24

Braden v. 30th Judicial Circuit Court of Ky.,
410 U.S. 484 (1973) 15, 16

Collins v. Loisel,
259 U.S. 309 (1922) 35

Cornejo-Barreto v. Seifert,
218 F.3d 1004 (9th Cir. 2000) 35

Cozart v. Wilson,
236 F.2d 732 (D.C. Cir.), *vacated as moot*,
352 U.S. 884 (1956) 26

Emmanuel v. United States,
253 F.3d 755 (1st Cir. 2001) 24

Factor v. Laubenheimer,
290 U.S. 276 (1933) 7

Goldman v. Weinberger,
475 U.S. 503 (1986) 28

Hamdi v. Rumsfeld,
542 U.S. 507 (2004) ..... *passim*

Hirota v. MacArthur,
338 U.S. 197 (1948) 12

Holmes v. Laird,
459 F.2d 1211 (D.C. Cir. 1972)..... 25, 27

In re Burt,
737 F.2d 1477 (7th Cir. 1984) 35

In re Kaine,
14 F. Cas. 84 (C.C.S.D.N.Y. 1852) 33

In re Kaine,
55 U.S. (14 How.) 103 (1852)..... 6, 31, 32

In re McDonald,
16 F. Cas. 33 (C.C.D. Mass. 1866) 33

In re Metzger,
17 F. Cas. 232 (S.D.N.Y. 1847)..... 31

Meacham v. Knolls Atomic Power Lab.,
461 F.3d 134 (2d Cir. 2006)..... 11

Mironescu v. Costner,
480 F.3d 664 (4th Cir. 2007) 35, 36

Morales v. TWA, Inc.,
504 U.S. 374 (1992) 21

National Ass'n of Homebuilders v. Defenders of Wildlife,
127 S. Ct. 2518 (2007) 21

Ntakirutimana v. Reno,
184 F.3d 419 (5th Cir. 1999) 7

Rasul v. Bush,
542 U.S. 466 (2004) 15, 16

Reid v. Covert,
354 U.S. 1 (1957) 6, 28

St. Martin Evangelical Lutheran Church v. South Dakota,
451 U.S. 772 (1981) 21-22

Sullivan v. Everhart,
494 U.S. 83 (1990) 11

Sumitomo Shoji Am., Inc. v. Avagliano,
457 U.S. 176 (1982) 14

Terlinden v. Ames,
184 U.S. 270 (1902) 8

U.S. v. Balsys,
524 U.S. 666 (1998) 36

United States ex rel. Stone v. Robinson,
431 F.2d 548 (3d Cir. 1970)..... 26, 28

United States ex rel. Wheeler v. Williamson,
28 F. Cas. 686 (C.C.E.D. Pa. 1855)..... 33

United States v. Curtiss-Wright Export Corp.,
299 U.S. 304 (1936) 7

United States v. Rauscher,
119 U.S. 407 (1886) 7

United States v. Robins,
27 F. Cas. 825 (D.S.C. 1799) 31, 37

Valentine v. United States ex rel. Neidecker,
299 U.S. 5 (1936) ..... *passim*

Vo v. Benov,
447 F.3d 1235 (9th Cir. 2006) 30

Williams v. Rogers,
449 F.2d 513 (8th Cir. 1971) 25-26, 27-28

Wilson v. Girard,
354 U.S. 524 (1957) ..... *passim*

CONSTITUTION, TREATIES, STATUTES, RULES AND REGULATIONS

U.S. Constitution, Art. II, § 2, cl. 2 30

Extradition Act of 1848, Act of August 12,
1848, Ch. 167 § 5, 9 Stat. 302, 303..... 4, 30, 31

Foreign Affairs Reform and Restructuring Act of
1998 P.L. 105-277 §1301,
codified at 8. U.S.C. §§ 1101 *et seq*..... 36

U.S. - Iraq Extradition Treaty,
49 Stat. 3380 (made June 7, 1934,
entered into force April 23, 1936) ... 4-5, 10, 11, 34

U.S. - Dominican Republic Extradition Treaty,
36 Stat. 2468 11

U.S. - El Salvador Extradition Treaty,
37 Stat. 1516 11

U.S. - Venezuela Extradition Treaty,
43 Stat. 1698 11

U.S. - Romania Extradition Treaty,
44 Stat. 2020 (made July 23, 1924,
entered into force April 7, 1925) 19, 20

U.S. - Albania Extradition Treaty,
49 Stat. 3313 11

U.S. - Lichtenstein Extradition Treaty,
50 Stat. 1337 11

U.S. - Romania Extradition Treaty,
50 Stat. 1349 (made Nov. 10, 1936,
entered into force July 27, 1937) 19-20

5 U.S.C. § 704 (2000) 36-37

8 U.S.C. §§ 1101 *et seq.* 36

8 U.S.C. § 1231(a) 36

10 U.S.C. Chapter 47 28

18 U.S.C. § 1381(a) 10

18 U.S.C. § 3181(b) 10

18 U.S.C. §§ 3181 *et. seq.* ..... *passim*

18 U.S.C. § 3183 ..... 14, 34

18 U.S.C. § 3184 ..... *passim*

18 U.S.C. § 3185 17

18 U.S.C. § 3186 ..... 33, 35-36

18 U.S.C. § 3196 ..... 33, 35-36

28 U.S.C § 1291 35

28 U.S.C. § 2241 16

22 C.F.R. § 95.4 (2001) 36-37

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Benvenisti, THE INTERNATIONAL LAW OF OCCUPATION (rev. ed. 2004); 12

Bilateral Treaties in Force (January 1, 2007) 10

Andrea Carcano, End of the Occupation in 2004? The Status of the Multinational Force in Iraq After the Transfer of Sovereignty To the Interim Iraqi Government, 11 J. CONFLICT & SECURITY L. 41 (2006) 12

H.R. Con. Res. 231, 110th Cong. (2007) 24

Restatement (Third) of Foreign Relations Law (1987) 30, 34

Samuel T. Spear, *The Law of Extradition, International and Inter-State* (3d ed. 1885) 18

Thom Shanker and Steven Lee Myers,
U.S. Asking Iraq for Wide Rights on War,
N.Y. TIMES, Jan. 25, 2008 24

U.S. Dep't of State Foreign Affairs,
11 FOREIGN AFFAIRS MANUAL 723.3 (2006) 26

2 U.S. Op. Atty. Gen. 559 (1833) 9

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6 U.S. Op. Atty. Gen. 85 (1853) 9

6 U.S. Op. Atty. Gen. 148 (1853) 7, 9

The President's Authority to Force the Shah to
Return to Iran, 4A U.S. Op. Off. Legal
Counsel 149 (1979) 9

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STATEMENT

M. Cherif Bassiouni and the other International Law Professors listed herein respectfully submit this *amicus* brief[1] in support of Respondents Sandra K.

[1] No counsel for a party authored this brief in whole or in part and no counsel or party made a monetary contribution intended (cont'd)

Omar and Ahmed S. Omar, as next friends of Shawqi Ahmad Omar, urging that this Court affirm the judgment in No. 07-394, and in support of Petitioner Maisoon Mohammed, as next friend of Mohammad Munaf, urging that this Court reverse the judgment in No. 06-1666.

INTEREST OF *AMICI*

Amici are professors who teach international law, including the law of extradition. *Amici* share the firm belief that the law of extradition—which has been developed over centuries to balance the interests of countries requesting extradition, the countries to which such requests are made, and the persons whose extradition is sought—applies in these cases, and should not be disregarded.

Amici represent a wide range of experiences and backgrounds. Many *amici* are practitioners who have litigated extradition cases. *Amici* have published and lectured extensively on extradition. *Amici* sign this brief in their individual capacities.

Many of the *amici* have been honored to submit *amicus* briefs in other cases in this Court, including in *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004).

A list of the *amici* appears as Appendix A.

(cont'd)
to fund the preparation or submission of this brief. No person other than counsel for *amici curiae* made a monetary contribution to its preparation. The parties have filed letters consenting to the filing of this brief with the Clerk of this Court.

SUMMARY OF ARGUMENT

Extradition is the exclusive process by which the United States may transfer one of its civilian citizens, in its effective control of custody (whether or not within U.S. territory), to a foreign state for criminal prosecution. Any transfer of Messrs. Omar and Munaf, who are U.S. civilian citizens, from effective U.S. control or custody to Iraqi custody can only be done through extradition. Any extradition must be done in compliance with the U.S.-Iraq Extradition Treaty—which, by its terms, applies not only to the territory of each country but also to any regions "*in the occupancy and under the control*" thereof—and the clear and the well-established framework for extradition established under U.S. statutes and practice. That extradition process must be used during times of armed conflict, as well as during times of peace.

The procedures and substantive provisions of the U.S.-Iraq Extradition Treaty and the U.S. Extradition Act will fully protect the interests of all parties—the United States, the State of Iraq, and the U.S. civilian citizens who are the subject of the proceedings.

ARGUMENT

A. EXTRADITION IS THE EXCLUSIVE PROCESS BY WHICH THE UNITED STATES MAY TRANSFER U.S. CITIZENS IN ITS CUSTODY AND CONTROL (WHETHER OR NOT IN U.S. TERRITORY) TO A FOREIGN STATE

For the past 160 years, since Congress enacted the Extradition Act of 1848,[2] extradition has been the exclusive process by which the U.S. government may surrender one of its civilian citizens to a foreign government for criminal prosecution. Nothing in the body of extradition law provides an exception to that process when the U.S. civilian citizen is under the effective control or custody of the U.S. extraterritorially.

The Federal Parties' principal argument against extradition—that "the transfer of a person *within* a foreign country is not an extradition"—is wrong. (Fed. Parties Br. at 44). Whether the law of extradition applies does not depend upon the location of the U.S. citizens, but upon whether the U.S. is exercising effective control or custody over its own citizens who are sought by a foreign state.

Indeed, the U.S.-Iraq Extradition Treaty explicitly applies to areas outside the territorial jurisdiction of the U.S. that are "*in the occupancy and under the control of*" the United States, 49 Stat.

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[2] Act of August 12, 1848, Ch. 167 § 5, 9 Stat. 302, 303.

3380 (made June 7, 1934, entered into force April 23, 1936). The U.S. extradition statute applies, as well, to U.S. citizens in any area under U.S. control. 18 U.S.C. § 3184.

Here, the proposed transfer of U.S. citizens would be from U.S. custody to Iraqi custody. Under due-process requirements, the terms of the U.S.-Iraq Extradition Treaty, and the extradition statute, there is no mechanism, other than extradition, by which the U.S. Executive may effect that transfer.

1. The Due Process Clause Protects U.S. Citizens, Here and Abroad, Against Lawless Or Arbitrary Transfers By The U.S. To A Foreign State

"[C]ommitment for any purpose constitutes a significant deprivation of liberty that requires due process protection." *Hamdi v. Rumsfeld*, 542 U.S. 507, 530 (2004) (O'Connor, J., plurality op.) (quoting *Jones v. United States*, 463 U.S. 354, 361 (1983)); *Addington v. Texas*, 441 U.S. 418, 425 (1979) (deprivation of the physical liberty protected by the Fifth Amendment "for any purpose ... requires due process protection"). Neither "the circumstances of war [n]or the accusation of treasonous behavior" can "offset" this entitlement. *Hamdi*, 542 U.S. at 530 (O'Connor, J., plurality op.).

This core principle of due process applies to extradition—which encompasses both detention for the purpose of transfer to another sovereign and then continued detention, after transfer, for a duration determined by that other sovereign:

> [T]he Constitution creates no executive prerogative to dispose of the liberty of the individual ... There is no executive discretion to surrender him to a foreign government, unless that discretion is granted by law. It necessarily follows that as the legal authority does not exist save as it is given by act of Congress or by the terms of a treaty, it is not enough that statute or treaty does not deny the power to surrender. It must be found that statute or treaty confers the power.

Valentine v. United States ex rel. Neidecker, 299 U.S. 5, 9 (1936). *Valentine* rests on both due process and separation of powers grounds, requiring judicial review to test the legality and constitutionality of a transfer. "[A]n extradition without an unbiased hearing ... ought never to be allowed in this country." *In re Kaine*, 55 U.S. (14 How.) 103, 113 (1852) (plurality op. of Catron, J.).

The Due Process Clause protects U.S. citizens both inside and outside the U.S. *Id.*; *Reid v. Covert*, 354 U.S. 1, 6 (1957) (Black, J., plurality op.).

> Whatever power the United States Constitution envisions for the Executive in exchanges with other nations ... it most assuredly envisions a role for all three branches when individual liberties are at stake.

Hamdi, 542 U.S. at 536 (O'Connor, J., plurality op.).

The *Valentine* rule further embodies separation of powers principles, reflecting the need for inter-branch responsibilities in decisions to deprive a person of liberty and to send him or her to face trial by a foreign sovereign. *See Valentine*, 299 U.S. at 8 ("[A]lbeit a national power, [extradition] is not confided to the Executive in the absence of treaty or legislative provision.")[3]; *Factor v. Laubenheimer*, 290 U.S. 276, 287 (1933) ("[T]he legal right to demand [a person's] extradition and the correlative duty to surrender him to the demanding country exist only when created by treaty"); *United States v. Rauscher*, 119 U.S. 407, 420 (1886) (Executive lacks power to extradite if offense is not on list of extraditable offenses); 6 U.S. Op. Atty. Gen. 148, 155 (1853) (Executive's power to extradite is "derived from the treaty-making power"); *Ntakirutimana v. Reno*, 184 F.3d 419, 424-25 (5th Cir. 1999).

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[3] *Valentine* was decided the same year as *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 319 (1936). In *Curtiss-Wright*, the Court put emphasis on "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations." *Id.* at 320. The Court went on to hold that legislation which granted wide discretion to the president in deciding when and to whom weapons could be sold was not an invalid delegation of Congressional power. *Id.* at 328. Thus, the same year that this Court recognized the "delicate, plenary and exclusive power" of the President in the field of international relations, this Court also recognized the need for inter-branch responsibilities in the extradition process. *Valentine*, 299 U.S. at 8.

In the absence of statutory or treaty authority—and in cases where the transfer would exceed the legislative grant of authority—the courts are obliged to deny transfer:

> Applying, as we must, our own law in determining the authority of the President, we are constrained to hold that his power, in the absence of statute conferring an independent power, must be found in the terms of the treaty and that, as the treaty with France fails to grant the necessary authority, the President is without power to surrender the respondents.

Valentine, 299 U.S. at 18; *accord Terlinden v. Ames*, 184 U.S. 270, 289 (1902).

Principles of separation of powers and the requirements of due process are tethered to, and reinforce, each other: "The very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive." *Hamdi*, 542 U.S. at 544-55 (J. Scalia, diss. op.), citing and quoting William Blackstone, 2 COMMENTARIES 131-33, and detailing the evolution of the writ of habeas corpus as a "tool for challenging executive confinement." *Id.* at 557. The requirement of a law to justify a particular individual's detention precludes precipitous unilateral action by the Executive against the individual (and political tyranny), while providing the judiciary a measure against which to test a claimed urgent need to detain—notwithstanding the Federal Parties' claim that such

is beyond the competence of the judiciary. (Fed. Parties Br., p. 28). *See Hamdi* at 560-6.

The Executive has itself long recognized *Valentine*'s separation of powers foundation as a check on its own authority to detain and deliver persons to foreign states. In 1833, then Attorney General Taney concluded that the transfer of two alleged pirates to Portuguese custody could not proceed because "[t]here is no law of Congress which authorizes the President to deliver up any one found in the United States who is charged with having committed a crime against a foreign nation." 2 U.S. Op. Atty. Gen. 559 (1833); *see also* 6 U.S. Op. Atty. Gen. 148, 155 (1853) (stating the Executive's power to extradite is "derived from the treaty-making power"). In 1841 and 1853, Attorneys General H. S. Legaré and Caleb Cushing reached the same conclusion. *See* 3 U.S. Op. Atty. Gen. 661, 661-662 (1841) (Legaré); 6 U.S. Op. Atty. Gen. 85, 86 (1853) (Cushing). As recently as 1979, the Office of Legal Counsel confirmed this position. *See The President's Authority to Force the Shah to Return to Iran*, 4A U.S. Op. Off. Legal Counsel 149, (1979) ("[t]he President cannot order any person extradited unless a treaty or a statute authorizes him to do so.").

2. Any Proposed Transfer Of A U.S. Civilian Citizen To The State of Iraq Can Only Be Done If Authorized By, And In Accordance With, The U.S.-Iraq Extradition Treaty, Which Explicitly Applies to Territory "In The Occupancy And Under The Control Of" The U.S.

Consistent with *Valentine*, the extradition statute is explicit that a U.S. citizen may be extradited to the custody of a foreign government "only during the existence of any treaty of extradition with such foreign government." 18 U.S.C. § 3181(a).[4]

There is an extradition treaty between the U.S. and Iraq, 49 Stat. 3380 (signed June 7, 1934, entered into force April 23, 1936) made with the advice and consent of the Senate, which the Department of State maintains is in force. *Bilateral Treaties in Force*, § I, p.129 (January 1, 2007).

The Federal Parties selectively quote from the U.S.-Iraq Extradition Treaty, stating that it only applies to persons "*who shall be found within the territories of the other High Contracting Party*." (Fed.

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[4] In contrast, under 18 U.S.C. § 3181(b), persons other than citizens, nationals, and permanent residents of the U.S. can be extradited for "crimes of violence against nationals of the United States in foreign countries without regard to the existence of any treaty of extradition with such foreign government" if specific requirements are met.

Parties Br. at 41) (Federal Parties' emphasis). But that language, in Article I of the Treaty, which sets forth the reciprocal undertaking to surrender, must be read together with Article XI of the Treaty, which defines the "territory" in which all undertakings of the Treaty apply. Article XI provides:

> The stipulations of this Treaty shall be applicable to *all territory wherever situated*, belonging to either of the High Contracting Parties or *in the occupancy and under the control of either of them, during such occupancy or control*.

Art. XI, 49 Stat. at 3383 (emphasis added).[5] Article XI thus defines the "territory" to which Article I applies. *Meacham v. Knolls Atomic Power Lab.*, 461 F.3d 134, 150 (2d Cir. 2006) (same words in two sections of the same statute must be interpreted in *pari materia*, "that is, as having the same meaning"); *Sullivan v. Everhart*, 494 U.S. 83, 92 (1990).

As U.N. Security Council Resolution 1483, the first post-invasion resolution, indicated, the U.S. accepted the "responsibilities and obligations under applicable international law [of] ... occupying

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[5] Some other extradition treaties use the same definition of territory. *See, e.g.*, Albania, 49 Stat. 3313, Art. XI; Dominican Republic, 36 Stat. 2468, Art. XI; El Salvador, 37 Stat. 1516, Art. XI; Lichtenstein, 50 Stat. 1337, Art. XI; Venezuela, 43 Stat. 1698, Art. XI (treaty applies to "all territories wherever situated, belonging to either of the Contracting Parties or under the jurisdiction or control of either of them").

powers." S.C. Res. 1483, U.N. Doc. S/RES/1483 (May 22, 2003) (punctuation omitted). The U.S. continues to occupy and control the areas of Iraq in which Messrs. Omar and Munaf are held.

> Although the formal occupation of Iraq ended on June 28, 2004, to the extent that the United States and other foreign troops operating in Iraq continue to wield effective control over Iraqis and Iraqi property, they are bound by this body of laws.

Benvenisti, THE INTERNATIONAL LAW OF OCCUPATION xiv-xv (rev. ed. 2004); *accord* Andrea Carcano, End of the Occupation in 2004? The Status of the Multinational Force in Iraq After the Transfer of Sovereignty To the Interim Iraqi Government, 11 J. CONFLICT & SECURITY L. 41, 58 (2006).

Indeed, under the terms of Article XI of the U.S.-Iraq Extradition Treaty—which applies during "occupancy *or* control" (emphasis added), even if formal occupancy had ended—because the U.S. remains in "control" of the areas of Iraq where Messrs. Omar and Munaf are held, the Treaty applies.

Thus, by its terms, the U.S.-Iraq Extradition Treaty applies to Messrs. Omar and Munaf—civilian citizens held by the U.S. in territory under U.S. occupancy and control. Any comparison to the U.S. troops acting on behalf of the International Military Tribunal for the Far East (as was at issue in *Hirota*

v. MacArthur, 338 U.S. 197 (1948)) is fundamentally misplaced. (*See* Habeas Petitioners' Br. at 35-44.)[6]

Of course, as part of the extradition process, Mr. Omar and Mr. Munaf must be afforded an opportunity to argue—as any subject of any extradition may do—that there should be no extradition. Their arguments may include arguments that the U.S.-Iraq Extradition Treaty does not authorize their extradition.[7] It would be premature for this Court to contemplate what those arguments might be, or to address the merits of those arguments, and *amici* do not do so. It is sufficient for this Court to determine, at this stage of the proceedings, that if there is to be any transfer of Mr. Omar or Mr. Munaf to the Iraqi government, it may

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[6] The Federal Parties argue that U.S. courts lack authority to block the MNF-I from surrendering custody of Messrs. Omar and Munaf to Iraqi authorities. (Fed. Parties Br. at 36). This attempt to mask the fact of U.S. custody of Messrs. Omar and Munaf behind the façade of the MNF-I cannot withstand scrutiny. The U.S. military in Iraq is under the command and control of President Bush, as Commander-in-Chief. In his capacity as Commander-in-Chief, President Bush ordered U.S. troops to Iraq. Those troops are under the unified command of the U.S. military; they are not commanded or controlled by the United Nations or any other international body. Similarly, the U.S. is not acting pursuant to the authority of the United Nations nor that of any other international body. Troops that operate under the direction of President Bush and the U.S. military, not MNF-I, control the custody of Messrs. Omar and Munaf.

[7] Interpretation of treaties is a judicial process. *Sumitomo Shoji Am., Inc. v. Avagliano*, 457 U.S. 176 (1982).

only be done in accordance with the U.S.-Iraq Extradition Treaty.

3. The U.S. Extradition Statute Is Not Limited To Persons Within The Territorial United States.

The U.S. extradition statute similarly applies to areas outside the United States but under its occupancy or control, 18 U.S.C. §§ 3181 *et. seq.*

First, 18 U.S.C. § 3181, which defines the scope of the statute, does not limit its applicability to the territorial jurisdiction of the U.S. Instead, it simply states, in pertinent part:

> The provisions of this chapter relating to the surrender of persons who have committed crimes in foreign countries shall continue in force only during the existence of any treaty of extradition with such foreign government.

Second, the fact that the extradition statute applies to U.S. citizens who are under the effective control or custody of the U.S. but who are held outside the U.S. is made explicit in 18 U.S.C. § 3183, which applies:

> Whenever the executive authority of any State, Territory, District, or possession of the United States demands any American citizen or national as a fugitive from justice who has fled to a country in which the United States exercises extraterritorial jurisdiction * * *.

Third, the section of the extradition statute that applies here, 18 U.S.C. § 3184, which governs extradition of a person to a foreign country with which the U.S. shares an extradition treaty, contains no limitation to persons within the territorial bounds of the U.S. The only requirement is that the person be "found within [the] jurisdiction" *of the judge* to whom the extradition request is made. That requirement is comparable to the jurisdictional requirement of the habeas corpus statute. *Rasul v. Bush,* 542 U.S. 466, 478 (2004); *Braden v. 30th Judicial Circuit Court of Ky.,* 410 U.S. 484, 495 (1973).

Section 3184 thus states, in part:

> Whenever there is a treaty or convention for extradition between the United States and any foreign government, or in cases arising under section 3181(b), any justice or judge of the United States, or any magistrate judge authorized so to do by a court of the United States, or any judge of a court of record of general jurisdiction of any State, may, upon complaint made under oath, charging *any person found within his jurisdiction,* with having committed within the jurisdiction of any such foreign government any of the crimes provided for by such treaty or convention, or provided for under section 3181(b), issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or magistrate judge, to the end that the evidence of criminality may be heard and

> considered. Such complaint may be filed before and such warrant may be issued by a judge or magistrate judge of the United States District Court for the District of Columbia if the whereabouts within the United States of the person charged are not known or, if there is reason to believe the person will shortly enter the United States.

18 U.S.C. § 3184 (emphasis added). The statute's jurisdictional language—providing that a warrant may be issued by a judge with respect to "*any person found within his jurisdiction*"—thus parallels that of the habeas statute, which provides that, "Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge *within their respective jurisdictions*." 28 U.S.C. § 2241 (emphasis added).

The language of the habeas statute has long been construed to vest jurisdiction in any court in the jurisdiction of which the custodian is found. *Rasul v. Bush,* 542 U.S. at 478; *Braden,* 410 U.S. at 495. In the habeas context, the basis for holding that a court having jurisdiction over the custodian may entertain a petition is that such court may provide effective relief, by directing the custodian to release the petitioner. 410 U.S. at 494-95. Similarly, when extradition is sought, the critical issue is whether the judge before whom the extradition application is made has jurisdiction to order effective relief—*i.e.*, to "issue his warrant for the apprehension of the person so charged, that he may be brought before such justice, judge, or magistrate judge, to the end that

the evidence of criminality may be heard and considered." 18 U.S.C. § 3184.

Here, Messrs. Omar and Munaf are in the custody of the Secretary of the Army and U.S. Army officers who are subject to the jurisdiction of the U.S. District Court for the District of Columbia. That court has jurisdiction to hear an application for extradition, because it can render effective relief: Granting, or denying, an application for the arrest and delivery of Messrs. Omar and Munaf to the custody of the foreign state seeking extradition.

The Federal Parties' principal argument against extradition—that "the transfer of a person *within* a foreign country is not an extradition"- is wrong. (Fed. Parties Br. at 44). A proposed transfer of the effective control or custody of a person from one State to another is extradition—whether or not it involves crossing a border. Here, the proposed transfer of a U.S. citizen would be from U.S. custody to Iraqi custody. The fact that the transfer would be from a section of Iraq that is under the control of the U.S., to a section of Iraq that is under the control of the State of Iraq, does not alter this analysis.

The extraterritorial scope of the U.S. extradition statute is also reflected in 18 U.S.C. § 3185, which provides for extradition from the U.S. to "any foreign country or territory ... occupied by or under the control of the United States" of persons who committed one of specific enumerated offenses in such territory and are thereafter found in the United States.

Both in contemporary practice, and historically, the definition of "extradition" is not confined by location:

> Extradition in contemporary practice means a formal process by which a person is surrendered by one state to another based on a treaty, reciprocity, comity, or on the basis of national legislation.

M. Cherif Bassiouni, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE (5th ed. 2007) ("Bassiouni, INT'L EXTRADITION") at 1. *See also* 1 John Bassett Moore, *A Treatise on Extradition and Interstate Rendition* 4 (1891) ("[E]xtradition may be defined as the delivery by a state of a person accused or convicted of a crime, to another state within whose territorial jurisdiction, actual or constructive, it was committed."); Samuel T. Spear, *The Law of Extradition, International and Inter-State* 70 (3d ed. 1885) (defining extradition as "the surrender by one sovereign State to another, on its demand, of persons charged with the commission of crime within its jurisdiction").

This application of the law of extradition is consistent with international law, which makes whichever country has "effective control" over detainees responsible for their manner of detention, and for providing all rights due them.[8] When the

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[8] See Int'l Law Comm'n, Responsibility of International Organizations: Titles and Texts of the Draft Articles 4, 5, 6, and (cont'd)

U.S. has "effective control" of its own citizens detained abroad, it is responsible not only for the manner of their detention, but whether they should be subject to extradition to the custody of a foreign state.

This is perhaps best illustrated by posing this question: If Romania gave credence to the allegations against Mr. Munaf [9]—to wit, that he participated in the kidnapping of three Romanian journalists with whom he traveled from Romania to Iraq—how would Romania go about securing his extradition to Romania? The State of Iraq lacks effective control and custody of Mr. Munaf, and thus could not extradite him to Romania. If Romania wanted to seek the extradition of Mr. Munaf, it could only do so by making an extradition request to the U.S., under the Extradition Treaty between Romania and the U.S., 44 Stat. 2020 (made July 23, 1924, entered into force April 7, 1925), supplemented by 50 Stat. 1349 (made Nov. 10, 1936, entered into force July 27,

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(cont'd)

7 Adopted by the Drafting Committee, Art. 5, U.N. Doc. A/CN.4/L.648 (May 27, 2004).

[9] Apparently, Romania gives no credence to the allegations against Mr. Munaf. Romania—which presumably would have an intense interest in bringing to justice those persons who kidnapped Romanian nationals—has not sought Mr. Munaf's extradition, and has insisted that U.S. Army Lieut. Robert M. Pirone, who stated that he was acting on behalf of Romania when he appeared before the CCCI, had no authority to do so. *See* Habeas Petitioners Br. at 12-13 n. 8.

1937).[10] That is because only the U.S. would have the ability to grant extradition, and, in fact, transfer custody of Mr. Munaf to Romania (assuming all applicable treaty and statutory standards were met).

Applying the law of extradition to this case supports, rather than undermines, the Federal Parties' concern that "The proper functioning of the CCCI [Central Criminal Court of Iraq] has been a key concern of [Multinational Force-Iraq] in promoting stability and security in Iraq, given that '[e]stablishing the rule of law is the cornerstone of a free and democratic society.'" (Fed. Parties Br. at 4). If Iraq seeks to have the U.S. transfer a U.S. citizen to the State of Iraq for prosecution in the CCCI or, as in Mr. Munaf's case, for carrying out a death sentence already imposed by the CCCI, Iraq should ask nothing more than that the U.S. follow the same procedures that the U.S. would follow if such custody were sought by, *e.g.*, Romania, or the United Kingdom, or France, or any other country with which the U.S. has an extradition treaty. None of those countries would expect the U.S. to transfer custody of a U.S. citizen without following the procedures set forth by treaty and statute. None of those countries would transfer their own citizens to the U.S. (if at all) without following their own treaty and statutory

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[10] As is true of the U.S.-Iraq Extradition Treaty, Article XI of the U.S.-Romania Extradition Treaty provides that the treaty "shall be applicable to all territory wherever situated, belonging to either of the High Contracting Parties or in the occupancy and under the control of either of them, during such occupancy or control." 44 Stat. 2020.

procedures. Far from according respect to the State of Iraq, the position taken by the Federal Parties fails to treat Iraq as a coequal sovereign.

Neither the Authorization of the Use of Military Force in Iraq, nor the fact that there is an armed conflict of an international character in Iraq, abrogates the applicability of extradition law.

Nothing in the Authorization suggests, in the slightest way, that it was intended to permit the transfer of U.S. citizens to Iraqi custody. Indeed, so construing the general language of the Authorization would imply a repeal of the clear rights afforded by the specific language of the Extradition Act, contrary to settled canons of statutory interpretation. *See National Ass'n of Homebuilders v. Defenders of Wildlife*, 127 S. Ct. 2518, 2532 (2007) ("We will not infer a statutory repeal 'unless the later statute "expressly contradict[s] the original act" 'or unless such a construction is 'absolutely necessary'"); *Morales v. TWA, Inc.*, 504 U.S. 374, 384 (1992) ("it is a commonplace of statutory construction that the specific governs the general..."). The Authorization reflects no "clear and manifest" intent to repeal the law of extradition; nor is such a construction "absolutely necessary" to give it meaning here. *National Ass'n*, 126 S. Ct. at 2532. Indeed, because the due process components of extradition are rooted in the Constitution, the Authorization *could not* abrogate those requirements (especially because the Authorization does not even attempt to provide alternate constitutionally-adequate procedures to accord rights protected by the Due Process Clause). *See St. Martin Evangelical Lutheran Church v.*

South Dakota, 451 U.S. 772, 788 (1981) ("The long-established canon of construction carries special weight when an implied repeal or amendment might raise constitutional questions...").

An armed conflict of an international character does not suspend extradition law. Article 45 of the Fourth Geneva Convention, which applies here, clearly envisages and endorses the continued application of extradition treaties during time of war or other armed conflict. Article 45 provides, in part:

> The provisions of this Article do not constitute an obstacle to the extradition, in pursuance of extradition treaties concluded before the outbreak of hostilities, of protected persons accused of offences against ordinary criminal law.

Convention (IV) Relative to the Protection of Civilian Persons in Time of War (Geneva, August 12, 1949), Art. 45. The Commentary to Article 45 states:

> The meaning of this reservation is quite clear: it is intended to ensure that the system of extradition functions normally. * * * It was * * * important to preserve the existing character of extradition as an act of penal procedure and to prevent it serving as a pretext for persecution.

Neither "the circumstances of war [n]or the accusation of treasonous behavior" can "offset" the rights of Messrs. Omar and Munaf, as U.S. citizens, to the due process protection that extradition

procedures afford. *Hamdi*, 542 U.S. at 530 (O'Connor, J., plurality op.).

4. There Is No Status of Forces Agreement With Iraq, And No Status of Forces Agreement Could Authorize Transfer Of A U.S. Civilian Citizen Not Part of the Military

In reliance upon *Wilson v. Girard*, 354 U.S. 524 (1957), the Federal Parties' argue that "[s]ettled practice with status of forces agreements" supports their view that the proposed transfer need not follow extradition practice. (Fed. Parties Br. at 43.) To the contrary, *Wilson* merely establishes that when there is a status of forces agreement that *has been authorized by a treaty made with the advice and consent of the Senate,* that agreement can establish procedures—grounded in treaty and statute—as an alternative to extradition, for the transfer of members of the U.S. armed forces to a foreign state. Nothing in *Wilson* authorizes the transfer of U.S. citizens who are not part of the U.S. military by any procedure other than extradition. Nothing in *Wilson* authorizes the transfer of members of the U.S. armed forces, by any procedure other than extradition, where there is no status of forces agreement specifically authorized by, or embodied in, a treaty.

Here, there is no status of forces agreement currently in effect between the U.S. and Iraq,[11] or between the United Nations and Iraq.[12]

In *Wilson v. Girard*, William Girard, an American serviceman stationed in Japan, sought habeas review to prevent his transfer to Japanese authorities for prosecution. 354 U.S. 524, 525 (1957). The U.S. had entered a Security Treaty with Japan, with the advice and consent of the Senate, that specifically authorized the making of an Administrative Agreement between the two Governments concerning the conditions governing the disposition of U.S. armed forces in Japan. *Id.* 526. The Senate reviewed and considered the terms of the Administrative Agreement before consenting to the treaty. *Id.* at 527. The Administrative Agreement established a procedure under which the U.S. could waive its right to exercise jurisdiction over members of the U.S. armed forces and their civilian staff for crimes arising out of any act or omission

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[11] *See* H.R. Con. Res. 231, 110th Cong. (2007): Expressing the sense of Congress that the Government should submit to the Government of Iraq a draft bilateral status of forces agreement; Thom Shanker and Steven Lee Myers, *U.S. Asking Iraq for Wide Rights on War*, N.Y. TIMES, Jan. 25, 2008, at A1.

[12] The United Nations has entered into status of forces agreements with countries to which it sends peacekeeping forces but, there is no such agreement with Iraq. *See, e.g.*, *Emmanuel v. United States*, 253 F.3d 755 (1st Cir. 2001) (reviewing the status of forces agreement between the United Nations and Haiti); *Bisson v. The United Nations*, 06-civ-6352, 2007 WL 2154181 (S.D.N.Y. July 27, 2007).

done in the performance of official duties committed in Japan. *Wilson*, 354 U.S. at 528. After reviewing the Agreement, the Senate consented to the Treaty. *Id.* at 527.

This Court found that pursuant to the Security Treaty, Girard could lawfully be transferred to Japanese authorities for trial, finding "no constitutional or statutory barrier" to the treaty. *Id.* at 530. The Court justified its finding "in light of the Senate's ratification of the Security Treaty" after the Senate had considered the Administrative Agreement, finding that the Treaty, consented to by the Senate, "authorized the making of the Administrative Agreement." *Id.* at 528-29.

Each of the cases cited by the Federal Parties for the proposition that the "[s]urrender of American servicemen for foreign trial pursuant to status of forces agreements has received consistent judicial approval" (Fed. Parties Br. at 43-44) involved a status of forces agreement that was either part of a treaty entered into with the advice and consent of the Senate, specifically authorized by a treaty consented to by the Senate, or specifically authorized by joint resolution of Congress. *See Wilson*, 354 U.S. 524 (Security Treaty with Japan, Senate's advice and consent provided on March 20, 1952); *Holmes v. Laird*, 459 F.2d 1211, 1219 (D.C. Cir. 1972) (NATO Status of Forces Agreement, Senate's advice and consent provided on July 15, 1953, and Supplementary Agreement, Status of Forces in the Federal Republic of Germany Agreement, August 3, 1959); *Williams v. Rogers*, 449 F.2d 513, 520 n. 12 (8th Cir. 1971) (Military Bases in the Philippines

Agreement, specifically authorized by joint resolution of Congress, June 29, 1944); *Cozart v. Wilson*, 236 F.2d 732, 733 (D.C. Cir. 1956), *vacated as moot*, 352 U.S. 884 (1956) (Security Treaty with Japan, made with the advice and consent of the Senate on March 20, 1952); *United States ex rel. Stone v. Robinson*, 431 F.2d 548 (3d Cir. 1970) (Security Treaty with Japan, made with the advice and consent of the Senate on March 20, 1952).

It is only such explicit Congressional authorization that allows status of forces agreements to provide a process, as an alternative to extradition, for the transfer of a U.S. citizen who is a member of the military to a foreign state for criminal proceedings.[13]

Wilson does not stand for the proposition that Messrs. Omar and Munaf must identify a treaty or statute barring a transfer. (Fed. Parties Br. at 38-39). Rather, *Wilson* and its progeny establish that the U.S. cannot transfer custody of one of its citizens to a foreign state *without* a treaty and statute

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[13] It is the position of the Department of State that, in determining whether to enter an international agreement pursuant to a treaty or executive agreement, one of the factors to be considered is "*whether the agreement can be given effect without the enactment of subsequent legislation by the Congress.*" U.S. Dep't of State Foreign Affairs, 11 FOREIGN AFFAIRS MANUAL 723.3 (2006) (emphasis added).

Consistent with *Wilson*, *supra*, a status of forces agreement can provide an alternative to extradition procedures only if the agreement is done with Congressional authorization.

authorizing such a transfer. If a valid status of forces agreement, *authorized by, or part of, a treaty made with the advice and consent of the Senate,* exists, the transfer can be effected pursuant to that treaty and agreement. If there is no such valid status of forces agreement, authorized by treaty, present and applicable to the particular U.S. citizen, the transfer can only be done pursuant to an extradition treaty and the implementing statutes. *See, e.g., Williams v. Rogers*, 449 F.2d at 523 (in analyzing the Military Bases in the Philippines Agreement, the Court concluded that Williams was "not being unlawfully extradited"); *see also Holmes v. Laird*, 459 F.2d at 1219 n. 59 ("[i]t is certainly the law that the power of the Executive Branch to invade one's personal liberty by handing him over to a foreign government for criminal proceedings must be traced to the provisions of an applicable treaty.").

The Federal Parties conclude their discussion of status of forces agreements by pointing out that this case "does not involve members of the United States military who have committed criminal offenses in Iraq." (Fed. Parties Br. at 44.) But that is simply another reason why the law of extradition applies.

Status of forces agreements can govern the rights of members of the U.S. armed forces, but cannot govern the rights of U.S. civilians.[14] *See, e.g.*,

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[14] In limited respects, a status of forces agreement can contain provisions relating to civilian dependents and support staff of the military.

Williams, 449 F.2d at 521; *Stone*, 431 F.2d at 553. "[T]he military is, by necessity, a specialized society separate from civilian society." *Goldman v. Weinberger*, 475 U.S. 503, 506-07 (1986) (quoting *Parker v. Levy*, 417 U.S. 733, 743 (1974).) "The essence of military service is the subordination of the desires and interests of the individual to the needs of the service." *Goldman*, 475 U.S. at 507. The policy in distinguishing the rights of those in the armed forces from those of civilians is evident in the Uniform Code of Military Justice (UCMJ), which applies to all members of the Uniformed Services, and sets forth laws providing for different procedural and due process rights as those conferred to civilians. *See* 10 U.S.C. Chapter 47. In *Reid v. Covert*, 354 U.S. 1 (1957), this Court, in concluding that provisions of the UCMJ extending court-martial jurisdiction to persons accompanying the armed forces could not be constitutionally applied to the trial of civilians, noted that military law is "substantially different from the law which governs civilian society. Military law ... emphasizes the iron hand of discipline more than it does the even scales of justice." 354 U.S. at 38.

Not only is *Wilson* inapposite, but it compels the conclusion that civilians such as Messrs. Omar and Munaf be accorded their due process rights and the protections of the law of extradition.

Although this case does not involve members of the U.S. military, what if it did? What if the CCCI sought custody of two U.S. citizens serving in Iraq in the U.S. armed forces, in the custody of the U.S. armed forces (whether acting on their own, or on behalf of MNF-I)? If there were a status of forces

agreement between the U.S. and Iraq, authorized by treaty, the question of whether custody would be transferred, and the procedures for such transfer, would be governed by the treaty and status of forces agreement. In the absence of such a status of forces agreement, *amici* certainly hope that the Federal Parties would not contend that U.S. citizens, serving in the U.S. armed forces, could be transferred from U.S. custody and control (or MNF-I custody) to the custody of the Iraqi government without being accorded basic due process protections through extradition.

B. Extradition Procedures Fully Protect the Interests of the United States, the Foreign State That Seeks Extradition, and the U.S. Citizens Whose Extradition Is Sought.

The Extradition Act sets out the procedures by which the United States may deliver to, or request from, another sovereign country an individual who is suspected, or has been convicted, of committing a crime.

These procedures are simple and straightforward: (1) there must be a treaty of extradition between both countries specifying the circumstances and methods by which extraditions occur; (2) the executive of the requesting country requests extradition under the applicable treaty; (3) a complaint is filed in the district court with jurisdiction; (4) the district court will then hold a hearing to evaluate (a) if there is probable cause to sustain the charge against the individual and (b) if

other treaty conditions have been met; (5) upon a finding of probable cause, the court will issue a certificate of extraditability; (6) a petition for a writ of habeas corpus may be considered, and (7) finally, the Department of State makes the ultimate decision of whether to sign the order of extradition. Bassiouni, INT'L EXTRADITION Ch. IX, § 2; *Restatement (Third) of Foreign Relations Law* § 478.

In devising this process, Congress sought to preserve the system of checks and balances and the constitutional doctrine of separation of powers by involving all three branches of the government. Bassiouni, INT'L EXTRADITION at 58-61. The Executive retains primacy by virtue of its power to make treaties and ultimately by its ability to decide whether or not to sign the order of extradition.[15] The role of the legislature is limited to providing "advice and consent" regarding treaties. U.S. Constitution, Art. II, § 2, cl. 2. The judiciary determines whether there exists an applicable treaty authorizing extradition, and evaluating whether probable cause exists to extradite.[16]

The history and purpose of the Extradition Act of 1848 is reflected in a line of three legal opinions:

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[15] The Executive, in addition, is obligated to consider whether a person subject to extradition would be tortured and cannot extradite a person if substantial grounds exist to believe that person would be tortured. *See infra* p. 36.

[16] *Vo v. Benov*, 447 F.3d 1235, 1237-38 (9th Cir. 2006) (describing role of the courts in extradition).

United States v. Robins, 27 F. Cas. 825 (D.S.C. 1799) (No. 16,175), *In re Metzger*, 17 F. Cas. 232 (S.D.N.Y. 1847) (No. 9,511), and *In re Kaine*, 55 U.S. (14 How.) 103 (1852). Bassiouni, INT'L EXTRADITION at 50.

In *Robins*, a U.S. citizen was arrested for suspicion of murder aboard a British ship and sought habeas relief from being transferred to British authorities for trial. 27 F. Cas. 825 (No. 16,175). The transfer was pursuant to Jay's Treaty of 1794, which provided that any person who committed a crime within one jurisdiction, yet sought asylum in the other, be transferred to the jurisdiction in which the suspected crime occurred for trial. *Id.* While this treaty received the Senate's "advice and consent," it was not implemented pursuant to legislation. Bassiouni, INT'L EXTRADITION at 51. Chief Justice John Marshall, then a member of Congress, concluded that once the executive had entered into an agreement with a foreign nation to transfer an individual to the custody of another nation, whether to transfer that individual was not subject to judicial review. 27 F. Cas. 825 (No. 16,175); Bassiouni, INT'L EXTRADITION at 54-55. In *Metzger*, the Supreme Court similarly concluded that it lacked jurisdiction to issue a writ of habeas corpus to review a district court's decision to commit an individual claimed by the French government based upon an agreement between the U.S. and France. 17 F. Cas. 232.

Robins and *Metzger* engendered enormous popular opposition, and led to the enactment of the Extradition Act of 1848. As this Court stated in *Kaine*, decided after the enactment of that Act:

> [A] great majority of the people of this country were opposed to the doctrine that the President could arrest, imprison and surrender, a fugitive, and thereby execute the treaty himself; and they were still more opposed to an assumption that he could order the courts of justice to execute his mandate, as this would destroy the independence of the judiciary.

Kaine, 55 U.S. (14 How.) at 112. The Federal Parties ask this Court to sweep aside nearly two centuries of extradition law, stating that to do otherwise would undermine the Executive's authority in foreign affairs, thereby interfering in the relationships between the U.S. and foreign countries. But those concerns have been present throughout the entire period of time that international extradition law has developed. Congress has amended and revised the Extradition Act numerous times, always maintaining the delicate balance of powers, and always maintaining a role for the judiciary.

The authority of the Executive is not, in any way, undermined by the well-defined role played by the judiciary in extradition. *Valentine* necessarily entails a role for the federal courts in transfers to other sovereigns. Describing Congress' first statutory provision for judicial review of transfers to other sovereigns, enacted in 1848, Justice Catron observed that Congress "obviously proceeded on this public opinion" and "thereafter referred foreign powers to the judiciary." *Kaine*, 55 U.S. at 113. Judicial protection of this Due Process entitlement consequently is guaranteed by the Suspension

Clause. *See In re Kaine*, 14 F. Cas. 84, 87 (C.C.S.D.N.Y. 1852) (No. 7,598) ("A stipulation in the [extradition] treaty prohibiting [habeas corpus] jurisdiction, equally with a like enactment in a statute, would be void, as in opposition to the constitution. The treaty-making power of Congress is not competent to suspend the writ of habeas corpus in time of peace."); *accord United States ex rel. Wheeler v. Williamson*, 28 F. Cas. 686, 688 (C.C.E.D. Pa. 1855) (No. 16,726); *In re McDonald*, 16 F. Cas. 33, 35-36 (C.C.D. Mass. 1866) (No. 8,752).

In addition to upsetting the balance between the executive, legislative, and judicial branches that has been developed in the law of extradition, the position of the Federal Parties in this case—the Secretary of the Army, and officers of the U.S. armed forces—improperly seeks to expand the authority of the Department of Defense, and diminish the authority of the Department of State, within the executive branch. Discretion of whether or not to proceed with extradition of a U.S. civilian citizen rests with the Secretary of State—not with the Secretary of Defense, and not with any member of the armed forces. 18 U.S.C. §§ 3186, 3196. To be sure, *amici* assume that if the Secretary of State objected to the proposed transfer, she would say so. But that is not the way extradition is supposed to work. The decision to extradite must be made by the Department of State—not made by the Department of Defense usurping the Department of State's authority.

1. The Request for Extradition

Iraq, as the requesting state, must formally request extradition pursuant to the Extradition Treaty. 18 U.S.C. § 3183. The request is made to the Department of State, which determines whether the request is within the relevant treaty, and if so, forwards the request to the Department of Justice for a similar screening. Once this is complete, the request is forwarded to the U.S. Attorney for the judicial district with jurisdiction. *Restatement (Third) of Foreign Relations* § 478 (1987).

The complaint must set forth the identity of the individual, the treaty in force, that an extraditable offense under the treaty was committed,[17] and the existence of probable cause supported by an accompanying charging instrument (or judgment of conviction). Bassiouni, INT'L EXTRADITION at 823-24. The complaint must also be accompanied by a sworn statement of the appropriate person with authority of the requesting country and all supporting evidence. *Id.*

2. The "Probable Cause" Hearing

The heart of the procedural safeguards afforded by the Extradition Act is the provision for a judicial hearing to determine "whether probable cause

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[17] Not all offenses are extraditable. The U.S.-Iraq Extradition Treaty lists 24 offenses that qualify for extradition "if they are punishable by the laws of both countries." U.S.-Iraq Extradition Treaty, Art. II, 49 Stat. 3380, TS 907 (June 7, 1934).

supports the charges." 18 U.S.C. § 3184; *Collins v. Loisel*, 259 U.S. 309, 316 (1922) ("whether there is competent evidence to justify holding the accused to await trial.").

Upon a finding of probable cause, the judicial officer "shall" certify the extraditability of the individual. 18 U.S.C § 3184. Such a finding is not a final decision under 28 U.S.C § 1291 and thus, it is not appealable.

3. Habeas Corpus in Extradition Proceedings

The subject of an extradition hearing may challenge the decision by habeas petition to test whether the offense charged is within the treaty, whether there is probable cause, and whether extradition should be denied based on defenses provided by the treaty or the Constitution. Bassiouni, INT'L EXTRADITION at 911-912. *In re Burt*, 737 F.2d 1477, 1482-85 (7th Cir. 1984) ("treaty obligations cannot justify otherwise unconstitutional governmental conduct") *quoting Plaster v. United States*, 720 F.2d 348, 349 (4th Cir. 1983); *Mironescu v. Costner*, 480 F.3d 664, 665 (4th Cir. 2007); *Cornejo-Barreto v. Seifert*, 218 F.3d 1004, 1009 (9th Cir. 2000), *citing Collins v. Miller*, 252 U.S. 364, 369-70 (1920).

4. The Discretion of the Department of State Not to Extradite

Even if there is a basis to extradite grounded in treaty and statute, and even if an extradition

hearing holds that there is probable cause, the Department of State has discretion not to extradite. 18 U.S.C. §§ 3186, 3196; *U.S. v. Balsys*, 524 U.S. 666, 719 (1998). This discretion may be exercised based on any grounds, including humanitarian or political grounds. *Mironescu*, at 666 (4th Cir. 2007), citing *United States v. Kin-Hong*, 110 F.3d 103, 109-10 (1st Cir. 1997); Bassiouni, INT'L EXTRADITION at 945.

Indeed, the Federal Parties are wrong when they claim the U.S. has no obligation to consider whether Messrs. Omar and Munaf would be tortured upon the transfer of their custody to Iraqi authorities. (Fed. Parties Br. at 47.) The Secretary of State has the obligation to determine whether a person subject to extradition would be tortured. In fact, under the Foreign Affairs Reform and Restructuring Act of 1998, ("FARR"), P.L 105-277 § 1301, codified at 8 U.S.C. §§ 1101 *et seq.*, implementing the United Nations Convention Against Torture,[18] the Department of State cannot extradite a person if "there are substantial grounds for believing the person would be in danger of being subjected to torture, regardless of whether the person is physically present in the United States." 8 U.S.C. § 1231(a).[19]

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[18] United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 46, U.N. GAOR, 39th Sess. 93 Plen. Mtg., at 395, U.N. Doc. A/64, at 63 (1984).

[19] There is a split in authority as to whether the Secretary of State's decision is reviewable under the Administrative (cont'd)

Among the *amici,* as professors of international law, there may be varying views as to whether it would be desirable to modify these procedures, by statute, in some respects. But the *amici* are united in their view that to simply cast these procedures aside, as the Federal Parties propose to do, undermines the rule of law, which is the foundation for the role that the U.S. plays in foreign affairs and "the cornerstone of a free and democratic society."

CONCLUSION

Holding that the law of extradition applies would not, in any way, dictate the outcome of the extradition hearing—an issue that is not ripe for this Court to address, and which the *amici* do not address. It is possible an extradition hearing could result in the transfer of Messrs. Omar and Munaf to Iraqi custody; it is also possible that extradition would be denied. All that *amici* ask, at this stage of the proceedings, is that this Court not permit the Federal Parties to turn back the law of extradition to the days of *Robins* (when the judiciary could not ensure that U.S. citizens subject to extradition would be afforded their due process rights), by transferring two U.S. citizens from the custody of the U.S. to the custody of Iraq without following the requirements of the applicable treaties and statutes.

(cont'd)
Procedure Act. 22 C.F.R. § 95.4 (2001); 5 U.S.C. § 704 (2000); Bassiouni, INT'L EXTRADITION at 796.

Because extradition is the exclusive process by which the U.S. may transfer Messrs. Omar and Munaf to the State of Iraq for Iraqi criminal proceedings, this Court should affirm the judgment in No. 07-394 and reverse the judgment in No. 06-1666.

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Respectfully submitted,

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